Eastern Pacific Industrial Corp Bhd v AD Metal Trading & Transport Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS T-02(NCvC)(W)-1260–08 OF 2023 AND T-02(NCVC)(W)-1310–08 OF 2023
SUPANG LIAN, MOHD NAZLAN AND AZIZUL AZMI ADNAN JJCA
11 MARCH 2025

Trespass — Trespass to goods — Whether claim proven — Whether damages awarded to plaintiff by trial court were justified

The respondent in Appeal 1260 ('AD Metal') had a contract with a company ('Hayat Lestari') under which AD Metal was to transport scrap metal from a site ('the site') to a steel factory for sale. For performing that task, Hayat Lestari paid AD Metal either RM100 per metric tonne for mid-sized scrap metal or RM200 per metric tonne for oversized scrap metal pieces. The site was also used for the decommissioning and dismantling of offshore platforms used in oil rigs. AD Metal sued the appellant in Appeal 1260 ('Eastern Pacific') for damages claiming that the latter's workers/agents had unlawfully detained or prevented AD Metal's lorries from removing the scrap metal from the site. The trial judge allowed the claim and ordered Eastern Pacific to pay AD Metal RM300,000 for loss of earnings and RM100,000 as exemplary damages. Both parties appealed against the decision — Eastern Pacific against both liability and quantum whilst AD Metal argued that the trial judge was wrong in dismissing the other heads of damages it had claimed for, including general damages and damages for loss of reputation.

Held, unanimously reducing the RM300,000 awarded to AD Metal to RM207,324, affirming the exemplary damages award, dismissing AD Metal's appeal and allowing Eastern Pacific's appeal in part:

(1) There was cogent evidence to support the trial judge's finding of liability against Eastern Pacific. The finding was not plainly wrong and did not warrant appellate intervention (see paras 12–13).

(2) The trial judge erred in awarding AD Metal RM300,000 as loss of earnings. This amount was the expected maximum revenue to AD Metal under the contract; it was not the profit it could have earned as the costs incurred by AD Metal in performing the contract were not taken into account. After taking into account AD Metal's loss of the RM200,000 deposit it had paid to Hayat Lestari (which was forfeited) and the transportation costs less the revenue AD Metal had earned from the

successful delivery of the scrap metal, the damages payable to AD Metal was RM207,324 (see paras 23, 25–29 & 37). A

(3) As this court could not conclude that the trial judge was plainly wrong in awarding the exemplary damages sum of RM100,000, the said award was affirmed. All other damages claimed by AD Metal had no basis and were therefore not granted (see para 38). B

[Bahasa Malaysia summary

Responden dalam Rayuan 1260 ('AD Metal') memasuki kontrak dengan sebuah syarikat ('Hayat Lestari') di mana AD Metal bersetuju mengangkut besi buruk dari tapak ('tapak') ke kilang keluli untuk dijual. Untuk melaksanakan kerja itu, Hayat Lestari membayar AD Metal sama ada RM100 setiap tan metrik untuk besi buruk bersaiz sederhana atau RM200 setiap tan metrik untuk kepingan besi buruk bersaiz besar. Tapak ini juga digunakan untuk mencabut dan memisahkan platform luar pesisir yang digunakan di pelantar minyak. AD Metal menyaman perayu dalam Rayuan 1260 ('Eastern Pacific') untuk ganti rugi kerana mendakwa bahawa pekerja/ejen Easter Pacific telah menahan atau menghalang lori AD Metal secara tidak sah dari mengeluarkan besi buruk dari tapak tersebut. Hakim perbicaraan membenarkan tuntutan itu dan memerintahkan Eastern Pacific membayar AD Metal sebanyak RM300,000 untuk kehilangan pendapatan dan jumlah sebanyak RM100,000 sebagai ganti rugi teladan. Kedua-dua pihak merayu terhadap keputusan itu — Eastern Pacific terhadap kedua-dua liabiliti dan kuantum manakala AD Metal menghujahkan bahawa hakim perbicaraan terkhilaf ketika menolak — ganti-ganti rugi lain yang dituntut, termasuk ganti rugi am dan ganti rugi kerana kehilangan reputasi. C D E F

Diputuskan, sebulat suara mengurangkan jumlah ganti rugi AD Metal sebanyak RM300,000, Mengekalkan ganti rugi teladan, mengenepikan rayuan AD Metal dan membenarkan tuntutan Eastern Pacific secara sebahagian: G

(1) Terdapat keterangan yang kukuh untuk menyokong penemuan hakim perbicaraan tentang liabiliti terhadap Eastern Pacific. Penemuan itu tidak salah dan tidak memerlukan campur tangan rayuan ini (lihat perenggan 12–13). H

(2) Hakim perbicaraan terkhilaf ketika menganugerahkan AD Metal RM300,000 sebagai kehilangan pendapatan. Jumlah ini adalah pendapatan maksimum yang dijangkakan oleh AD Metal di bawah kontrak; ianya bukan keuntungan yang boleh diperoleh kerana kos yang ditanggung oleh AD Metal dalam melaksanakan kontrak tidak diambil kira. Selepas mengambil kira kerugian deposit RM200,000 yang telah dibayar kepada Hayat Lestari oleh AD Metal (yang telah dilucuthakkan) dan kos pengangkutan ditolak hasil yang diperoleh AD Metal dari kerja penghantaran besi buruk, ganti rugi yang perlu dibayar kepada AD Metal I

adalah sebanyak RM207,324 (lihat perenggan 23, 25–29 & 37).

(3) Oleh kerana mahkamah ini tidak dapat membuat kesimpulan bahawa hakim perbicaraan jelas khilaf dalam memberikan ganti rugi teladan sebanyak RM100,000, ganti rugi tersebut telah dikekalkan. Semua ganti rugi lain yang dituntut oleh AD Metal tidak mempunyai asas dan oleh itu tidak dibenarkan (lihat perenggan 38).]

Cases referred to

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)

Legislation referred to

Civil Law Act 1956 s 3
Torts (Interference with Goods) Act 1977 [UK]

Appeal from: *AD Metal Trading & Transport Sdn Bhd lwn Eastern Pacific Industrial Corporation Bhd* [2024] MLJU 3778 (High Court, Kuala Terengganu)

Saiffuddin Othman (Wan Abd Muttalib & Co) in Civil Appeal Nos T-02(NCvC)(W)-1260–08 of 2023 and T-02(NCVC)(W)-1310–08 of 2023 for the plaintiff.
Mohd Hisham Mohd Nazir (Hisham Nazir & Co) in Civil Appeal Nos T-02(NCvC)(W)-1260–08 of 2023 and T-02(NCVC)(W)-1310–08 of 2023 for the respondent.

Azizul Azmi Adnan JCA (delivering judgment of the court):

INTRODUCTION

[1] The plaintiff in this case, AD Metal Trading & Transport Sdn Bhd, is involved in the recycling of metals. It entered into a contract with a company known as Hayat Lestari Sdn Bhd ('Hayat Lestari') to transport materials from a site known as the Kemaman Supply Base. It was not in material dispute that the premises in question was used for the purposes of decommissioning and dismantling offshore platforms used in petroleum exploration and production.

[2] The plaintiff alleged that the defendant, Eastern Pacific Industrial Corp Bhd had unlawfully detained or prevented its lorries from removing recycling materials from the Kemaman Supply Base. The plaintiff contended that it suffered losses as a consequence.

[3] It was not in material dispute that the plaintiffs' lorries had in fact been detained and prevented from removing materials from the base by auxiliary

police wearing uniforms adorned with badges bearing the name and acronym of the defendant (see E6/452). However, it was advanced for the defendant that it was not the entity that operated the Kemaman Supply Base. In the course of submissions before us, counsel explained that the operating company, Kemaman Supply Base Sdn Bhd, was a subsidiary of the defendant. For this reason, argued counsel, the plaintiff had sued the wrong party.

[4] After a full trial of the action, the trial judge allowed the plaintiff's claim in part, awarding damages for loss of earnings in the amount of RM300,000, and exemplary damages of RM100,000.

THE GROUNDS OF APPEAL

The defendant's appeal

[5] The defendant appealed in Appeal No 1260 against the decision of the court below, raising three principal grounds of appeal:

(a) that the trial judge had made an erroneous finding of fact at para 7 of her grounds of judgment when she stated that the offshore deconstruction area in the Kemaman Supply Base was operated by the defendant. Counsel argued that this finding was copied from the statement of claim and was not supported by the evidence adduced at trial;

(b) that the trial judge had made an erroneous finding of fact that the defendant was responsible for the auxiliary police; and

(c) that the plaintiff had failed to prove its damages, and hence the award of damages ought to be set aside.

The plaintiff's appeal

[6] The plaintiff also appealed. It was advanced for the plaintiff that the trial judge ought to have awarded the rest of the damages claimed for by the plaintiff, namely:

(a) general damages (para 33(e) of the statement of claim);

(b) RM6,000 per day for the period beginning on 5 April 2021 until the plaintiff was again permitted to perform its transportation services (para 33(f));

(c) RM200,000 as deposit paid to Hayat Lestari (para 33(g));

(d) RM2.76m being the estimated value of the materials that still remained on site and which could not be removed as a result of the actions of the defendant (para 33(h));

(e) RM45,000 as the penalty for delays that the plaintiff had been subjected

to, in respect of the removal and delivery of materials after 5 April 2021 (para 33(j));

(f) RM30m for damage to the plaintiff's reputation (para 33(k));

(g) damages for its loss of freedom to trade (para 33(l)); and

(h) damages arising from negligence for unlawful detention. Paragraph 33(n) of the statement of claim stated as follows, in the National language:

ganti rugi kecuaian tindakan penahanan salah.

THE CAUSES OF ACTION ADVANCED

[7] We observed with not a little regret that the cause of action pursued by the plaintiff in this case had not been specifically identified in the statement of claim, save for the reference to 'penahanan salah' at para 33(n). Nor was the cause of action pursued identified in the initial submissions of the parties. The grounds of judgment of the court below provided no further elucidation.

[8] There were, to our minds, three possible causes of action that may be pursued at common law: the tort of trespass to goods, conversion and detinue. We directed for parties to address us in further submissions as to which of the causes of action applied in the present case.

Trespass to goods, conversion and detinue distinguished

[9] The law relating to the protection of interests in goods is somewhat complex, due to the overlapping nature of the causes of action, and by reason that these causes of action had evolved over time to address contemporary needs. The distinct causes of action may be summarised as follows (see generally, *Clerk & Lindsell on Torts* (24th Ed) at 16–01 et seq):

(a) *trespass to goods*. Trespass to goods may be defined as the wrongful interference with the possessory right of a plaintiff to goods. A plaintiff must establish direct interference with possession under this cause of action. Like other forms of trespass, it is actionable without proof of loss. Damages are assessed by reference to the costs of repair of the goods, or by the value of the goods if it had been destroyed;

(b) *conversion*. By contrast to trespass to goods (which is a personal right of action), conversion is a proprietary right of action. It lies in the unlawful appropriation of another's goods, and covers the deliberate taking, receipt, purchase, sale, disposal or consumption of another's property. Unlike trespass, it covers not just an interference with a claimant's possessory right to goods, but also any injury to his right or title in them.

The plaintiff in an action for conversion is compensated in damages calculated by reference to the value of hire of the goods for the period of its conversion, or the value of the goods themselves; and

(c) *detinue*. In an action for detinue, a claimant has a right to immediate possession for the wrongful detention of his goods. Like conversion, it is a proprietary right of action, but does not require proof of intentional interference with the goods in question. The cause of action does not accrue until a demand for the goods detained has been made, and the defendant refuses to deliver up possession. In general, detinue may only be maintained against the defendant if he continues to have possession of the goods. A plaintiff's remedy for detinue lies in the recovery of the goods in specie either in lieu or in addition to damages. Damages are assessed on the date of judgment (whereas in action for conversion, damages are assessed as at the date of the commission of the tort). In England, the cause of action for detinue has been abolished by the Torts (Interference with Goods) Act 1977, but continues to apply in Malaysia by reason of the reception of English common law under s 3 of the Civil Law Act 1956.

[10] It may thus be seen that the question of which cause of action was being pursued was pertinent for at least two reasons:

(a) first, the method of assessment of damages would be different for the different causes of action; and

(b) second (and no less significantly), if the cause of action was one in grounded in tort, the plaintiff may not be entitled to claim for pure economic losses.

[11] In our considered judgment, the cause of action pursued by the plaintiff was best described as an action for trespass to goods. There was no evidence of conversion of the goods on the part of the defendant. Further, there was no evidence of demand made to the defendant for the delivery up of possession, which is an essential ingredient for the tort of detinue.

FINDINGS ON LIABILITY

[12] The following are the findings of the court on liability:

(a) the issue of who bore the legal responsibility to manage or operate the Kemaman Supply Base was not a relevant consideration, if it is established that the auxiliary police had acted on the instructions or were otherwise the agents of the defendant;

(b) the evidence on record showed that:

A (i) the former head of security ('PW6') and head of operations ('PW7') both testified that the auxiliary police had acted on the instructions of the defendant;

(ii) the letter from the police showed the change of name of the
B auxiliary police from Pengkalan Bekalan Kemaman Sdn Bhd to the Eastern Pacific Industrial Corporation Bhd had been approved on 2 June 2015 (E6/450); and

(iii) the badges worn by the auxiliary police indicated the name of the defendant, all of which suggest that there was cogent evidence to
C support the conclusion of the trial judge that the auxiliary police were under the responsibility and control of the defendant. The finding of fact of the trial judge in this respect cannot be said to be plainly wrong.

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[13] For these reason, we do not consider that appellate intervention would be justified, and the defendant's appeal on liability is dismissed with costs.

DAMAGES

E

The terms of the letter of award

[14] The letter of award issued by Hayat Lestari to the plaintiff was set out at p 415 of encl 6 in the record of appeal. The terms of this letter established that
F the plaintiff would purchase the scrap metal from Hayat Lestari. The plaintiff would then sell the scrap metal to a steel factory, described by the plaintiff's project manager (Ishak Malim bin Sidik Malim, PW4) as Eastern Steel (E4/222). However, even though the plaintiff was expressed as a buyer of the scrap metal, the revenue that it obtained under the terms of the contract with
G Hayat Lestari was based on a fixed margin. The plaintiff was to pay to Hayat Lestari the price that the steel factory paid for the scrap metal, less a fixed margin of RM100 per metric tonne for mill-sized scrap metal or RM200 per metric tonne for oversized scrap metal pieces.

H **[15]** The letter of award set out the estimated quantity of scrap metal as 1,500 metric tonnes. Thus, assuming that all the scrap metal was oversized, the maximum estimated revenue that the plaintiff could have attained under the letter of award was RM200/MT x 1,500MT = RM300,000.

I **[16]** No evidence was led as to how much of the scrap metal to be removed from the Kemaman Supply Based was oversized.

[17] Now, it has to be borne in mind that this sum of RM300,000 represented the revenue that the plaintiff could have attained had it not been

prevented by the defendant from removing the scrap metal. It was not the plaintiff's profit. In order to ascertain the profit, the plaintiff must show the costs it would have to incur in performing the contract. The only evidence that was led in this regard was the cost of RM2,000 per lorry per day. Based on the single delivery that was permitted to leave the Kemaman Supply Base on 5 April 2021, we know that this lorry carried 23.38MT of scrap metal. No evidence was led as to how many trips a single lorry can undertake in a day. The court may take judicial notice that the distance between the Kemaman Supply Place and the Eastern Steel factory in Kijal is less than 10km, but no evidence was led on how long it would take to load each lorry with scrap metal, which would have a bearing on how many trips a single lorry would be able to undertake in a single day.

[18] The plaintiff led evidence that it had demarcated three lorries for the purposes of performing the contract. Evidence was also led that lorries had been deployed on 6 April 2021, but were not permitted to remove the scrap metal from the Kemaman Supply Base.

Measure of damages: Costs and expenses or loss of profits?

[19] In a contractual cause of action, a plaintiff may claim for its loss of profits under the contract, or it may claim for the costs and expenses it had expended in pursuing the contract, but it may not claim both.

[20] By contrast, the measure for damages under a tortious cause of action would generally be restorative (save perhaps for certain categories of economic torts). The Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1 explained the principles for pure economic losses in negligence and nuisance claims, which in our view would equally apply to the tort of trespass to goods. The Federal Court stated:

> Pure Economic Loss
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> The third question postulated the consideration of whether pure economic loss is recoverable under the Malaysian jurisprudence in negligence and nuisance. In the law of negligence, there is no immutable rule that pure economic loss is not recoverable. All major Commonwealth jurisdictions recognize that pure economic loss is recoverable in negligence. Under English law, the general duty of care test enunciated in *Caparo Industries Plc v Dickman and other appellants* [1990] 2 AC 605 is applicable to all negligence claims, including claims for pure economic loss. Pursuant to this test, three questions have to be addressed, namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care. The English courts have adopted a dual approach in applying the *Caparo* test (see *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The 'Nichlas H')* [1996] 1 AC 211). The first concerns the 'categorization approach'. Here, the English courts would

A determine if the plaintiff's claim falls into a recognised category of liability. In cases of pure economic loss, the recognised categories include the following scenarios ie, (1) where a defendant has assumed a particular responsibility towards the plaintiff. For example, in *White v Jones* [1995] 2 AC 207, where a solicitor was found to have assumed a responsibility towards the beneficiary under a will when drafting the will
B pursuant to a testator's instructions; (2) where a defendant has exposed a plaintiff to a particular danger (see *Harris v Evans* [1998] 1 WLR 1285) and (3) where there is a recognised legal relationship between the plaintiff and defendant. For example, in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 6019, 667, it was found that a teacher-pupil relationship might place a teacher under a duty of care not to
C cause pure economic loss by teaching pupils the wrong syllabus. The second concerns the 'open-ended approach'. Here, if the facts of a particular case do not come within a recognised category of liability, a court could go further to look at the facts closely to determine if a duty of care should nevertheless be owed by the defendant to the plaintiff. Recent statements by the English courts confirm that the
D 'open-ended approach' can be used to recognize duties of care in new situations: (see *Spring v Guardian Assurance Plc* [1985] 2 AC 295).

[21] We are of the view that pure economic loss may be claimed for the tort of trespass to goods, provided that such losses are reasonably foreseeable. On
E the facts of the present case, the act by the agents of the defendant in detaining the lorries could reasonably be foreseen to have caused the loss of profits that the plaintiff could have attained from the sale of the scrap metal.

[22] In this case, certain heads of damages claimed by the plaintiff related to
F the costs and expenses that it had incurred (for example the costs of the lorries), while certain other heads related to the loss of profits (the estimated RM300,000 revenue that it would attain under the contract, which was awarded by the trial judge). As explained, the plaintiff would not be able to claim both. It would have to elect whether the damages would be purely
G restorative, or whether to claim for its economic losses in not being able to perform the contract constituted by the letter of award.

[23] Further, as explained, the claim for RM300,000 represented the expected maximum revenue to the plaintiff under the contract; it was not the
H profit that the plaintiff could have obtained, because account must be made of the costs that it would have had to incur in order to perform the contract. The trial judge was thus in error in awarding RM300,000 to the plaintiff.

[24] In the following paragraphs, we explain the damages that could have
I been claimed by the plaintiff under each alternate measure, and conclude that the plaintiff would have been able to obtain higher damages on the basis of the costs and expenses it had incurred.

Costs and expenses

[25] Evidence was led that the plaintiff had paid a deposit of RM200,000 to Hayat Lestari and that this deposit had been forfeited. The fact that the deposit was paid was supported not only by the terms of the letter of award but also the remittance advice for a RENTAS transfer made on 22 March 2021 (E6/421).

[26] As explained, evidence was also led that the plaintiff had to incur costs RM2,000 per lorry per day for three lorries. Collections were attempted on 5 and 6 April 2021. Only one delivery was successfully made.

[27] In our judgment the plaintiff would have been under a duty to mitigate its losses, and so we would permit the expenses incurred only for those two days, which would total to RM12,000 (three lorries over two days at a rate of RM2,000 per lorry per day).

[28] Against this must be deducted the revenue that the plaintiff had attained from the single successful delivery. We know that the weight of the delivery was 23.38MT. Assuming that the delivery was for oversized scrap metal, the revenue accruing to the plaintiff for this delivery would have been:

23.38MT x RM200/MT = RM4,676.

[29] The revenue must be deducted if the claim is purely restorative in nature and based on the costs and expenses that the plaintiff had incurred.

[30] The damages claimable on the basis of costs and expenses would thus be:

RM200,000 + RM12,000 - RM4,676 = RM207,324.

Loss of profits

[31] By contrast, the damages payable to the plaintiff for loss of profits would only have been RM170,000.

[32] The maximum estimated revenue attainable by the plaintiff was RM300,000, based on the estimated quantity of scrap metal of 1,500MT and assuming all the metal pieces were oversized (which would be a generous assumption):

1,500MT x RM200/MT = RM300,000.

[33] We know that the lorry that had made the single successful delivery carried 23.38MT of material. Assuming that this was the maximum load for each lorry, the plaintiff would have had to make 65 trips to transport the estimated 1,500MT of scrap material:

A 1500MT ÷ 23.38 = 64.16 ~ 65 trips.

[34] As explained, the plaintiff did not lead evidence on how many trips a lorry would be able undertake in a day, and hence we are constrained to assume that only a single trip would be feasible by one lorry in a day. If that were the case, the total cost of the lorries would be:

B RM2,000 x 65 trips = RM130,000.

[35] These would be the direct costs incurred by the plaintiff in performing C the contract under the letter of award.

[36] The total profits that the plaintiff would have been able to attain was thus:

RM300,000 – RM130,000 = RM170,000.
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[37] We would vary the order of special damages awarded by the trial judge to RM207,324 based on the costs and expenses incurred by the plaintiff.

E *The other heads of damages*

[38] We deal with the other heads of damages as follows:

(a) exemplary damages. We are unable to conclude that the trial judge had been plainly wrong to award exemplary damages of RM100,000. This F order is affirmed;

(b) general damages. We are of the view that no separate award for general damages would be appropriate, as the losses incurred by the plaintiff has been adequately addressed by the award of special damages;

G (c) total value of materials. The plaintiff claimed RM2.76m, being the estimated value of the materials that still remained on site and which could not be removed as a result of the actions of the defendant. This would not have been claimable because, even though the plaintiff was the buyer of the scrap metal under the terms of the letter of award, the bulk H of the proceeds of sale would have been payable to Hayat Lestari, with the plaintiff only being entitled to a fixed margin based on tonnage;

(d) penalty of RM45,000. This was claimed as the penalty for delays that the plaintiff had been subjected to, in respect of the removal and delivery of I materials after 5 April 2021. However, the letter of award;

(e) contained no such stipulation. Furthermore the supposed contract that was entered into with Eastern Steel was not exhibited. As such, there was no way in which the court would be able to ascertain whether such penalty was payable or whether it had in fact been paid;

(f) RM30m for damage to the plaintiff's reputation. This was dismissed on the basis that it was not proven; nor could such damage be said to be reasonably foreseeable; and

(g) damages for its loss of freedom to trade. This was dismissed on the basis that the law recognised no such cause of action.

[39] The other heads of damages claimed have been subsumed or addressed in determining the costs and expenses that the plaintiff had incurred.

[40] For these reasons, the plaintiff's appeal on damages is dismissed in its entirety. The defendant's appeal on damages is allowed to the extent explained.

[41] We direct that the parties bear their own costs in both appeal.

RM300,000 awarded to AD Metal reduced to RM207,324, exemplary damages award affirmed, AD Metal's appeal dismissed and Eastern Pacific's appeal allowed in part.

Reported by Ashok Kumar